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No. 06-0119

Supreme Court, U.S.
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In The Supreme Court of the United States

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,

Petitioner,

v.

FRIENDS OF THE EARTH, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.....iii

REPLY ARGUMENT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI 1

CONCLUSION.....3

TABLE OF AUTHORITIES

Page

CASES

Friends of the Earth, Inc. v. Environmental Protection Agency, 446 F.3d 140 (D.C. Cir. 2006) 1

Natural Resources Defense Council, Inc. v. Fox, 93 F. Supp. 2d 531 (S.D.N.Y. 200) 2

Natural Resources Defense Council, Inc. v. Muszynski, 268 F.3d 91 (2d Cir. 2001) 1, 2

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) 2

STATUTES

42 U.S.C. § 6976(a)(1) 2

42 U.S.C. § 7607(b) 2

OTHER

EPA Guidance Memorandum "Establishing TMDL 'Daily' Loads in Light of Decision by the U.S. Court of Appeals for the D.C. Circuit in *Friends of the Earth, Inc. v. EPA, et al.*, No. 05-5015, (April 25, 2006) and Implications for NPDES Permits" (Nov. 15, 2006) 1, 2, 3

REPLY ARGUMENT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.6, Petitioner District of Columbia Water and Sewer Authority ("WASA") submits this reply to new points raised by Federal Respondents' opposition to the petition for writ of certiorari.[1]

In their opposition to WASA's petition, the Federal Respondents concede several points that support WASA's petition. First, they agree with WASA that the United States Court of Appeals for the District of Columbia Circuit in *Friends of the Earth, Inc. v. Environmental Protection Agency*, 446 F.3d 140 (D.C. Cir. 2006), wrongly decided that Total Maximum Daily Loads ("TMDLs") must be expressed only as a quantity of pollutant over a 24-hour day. Fed. Resp't Br. 7-9. Second, they agree with WASA that the decision of the United States Court of Appeals for the Second Circuit in *Natural Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001), upholding non-daily TMDLs was correctly decided. Fed. Resp't Br. 10. Third, they agree with WASA that these two decisions present a clear conflict between the circuits. Fed. Resp't Br. 10.

Notwithstanding these concessions, the Federal Respondents assert that the conflict between the circuits does not warrant this Court's review because (1) the decision below is controlling law only in the District of Columbia, and (2) the flexibility provided by a recent guidance memorandum issued by the Environmental

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[1] In their opposition, Respondent Friends of the Earth, Inc. defends the panel decision on the merits and does not raise new points meriting further reply. WASA relies upon the argument made in its Petition in this regard.

Protection Agency ("EPA") will limit the prospective effect of the disagreement between the D.C and Second Circuits. Fed. Resp't Br. 10. These arguments are fundamentally flawed and, if anything, support rather than undermine WASA's petition.

First, the Federal Respondents' attempt to minimize the impact of the panel ruling by characterizing it as controlling law only in the District of Columbia fails to acknowledge the D. C. Circuit's predominant role in reviewing agency action and environmental disputes. Congress has directed that rulemaking challenges under key environmental statutes be filed in the D. C. Circuit. *E.g.*, 42 U.S.C. § 7607(b) (Clean Air Act); 42 U.S.C. § 6976(a)(1) (Resource Conservation and Recovery Act). This Court has long recognized that "[s]ince the vast majority of challenges to administrative agency action are brought to the Court of Appeals for the District of Columbia Circuit, the decision of that court . . . will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 535 (1978). Other federal courts also view the decisions of that circuit as important guidance in such matters. *E.g., Natural Resources Defense Council, Inc. v. Fox*, 93 F. Supp. 2d 531, 543 (S.D.N.Y. 2000). Therefore, there is no valid basis for minimizing the significance of the D. C. Circuit's decision and the clear circuit conflict presented on a matter affecting literally "thousands of different waterbodies" nationwide. *Muszynski*, 268 F.3d at 97.

Second, the new EPA guidance memorandum relied on by the Federal Respondents is in direct conflict with and contrary to their claim that the D. C. Circuit's ruling has a limited impact. The guidance is directed to all EPA regional offices. Fed. Resp't Br. App. 1a. In the guidance, EPA

acknowledges that "there is significant legal uncertainty about whether courts across the country will follow the reasoning of the D. C. Circuit decision" and "recommends that all future TMDLs . . . be expressed in terms of daily time increments." Fed. Resp't Br. App. 2a-3a. This effectively adopts the D. C. Circuit's decision and applies it nationwide.

Contrary to the Federal Respondents' argument, EPA's new guidance memorandum will compound rather than minimize the adverse consequences of the opinion below. While directing that TMDLs are to be expressed on a daily basis, the guidance then provides that the EPA regions and States can continue to write permits containing non-daily limits to implement the daily TMDLs. Fed. Resp't Brief. App. 2a.

Thousands of non-daily TMDLs have either been developed or are under development nationwide. These TMDLs, in turn, establish the basis for countless water quality-based effluent limitations involving billions of dollars of municipal wastewater infrastructure. If left standing, the D.C. Circuit's decision, even as explicated by the new guidance, will lead to protracted litigation across the country. Even if respondent Friends of the Earth were content to accept the new guidance (and nothing in its filing suggests that it would accept it), there are many potential litigants with likely standing who can be expected to commence litigation. WASA respectfully submits that finite public resources would be better spent on water quality improvement rather than in unbounded litigation.

CONCLUSION

Notwithstanding the new guidance from EPA, there will remain an intercircuit split that threatens combined

sewer overflow control planning and implementation to the detriment of water quality, making this case "cert-worthy." Wherefore, WASA requests that this Court grant WASA's petition and resolve this conflict between the circuits.

Respectfully Submitted,

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